

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1912 of 2000

For Approval and Signature:

Hon'ble MISS JUSTICE R.M. DOSHIT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

H N RAO

Versus

STATE OF GUJARAT

Appearance:

MR IS SUPEHIA for Petitioner

MR SP HASURKAR for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 21/07/2000

ORAL JUDGEMENT

Heard the learned advocates.

2. The petitioner, a former Police Sub-Inspector, challenges the Order dated 4th March, 1999 made by the

Director General & Inspector General of Police whereunder the petitioner has been dismissed from service. The said order has been confirmed in revision by the State Government on 29th November, 1999.

3. In the year 1993 an offence punishable under Sections 7, 12, 13 (1) & 13 (2) of the Prevention of Corruption Act, 1988 and Section 161 IPC was registered against the petitioner in the Nadiad ACB Police Station. The petitioner was tried in Special Case No. 7 of 1994. The learned Addl. Sessions Judge, Nadiad by his judgment and order dated 5th May, 1998 convicted the petitioner for offence punishable under Sec. 161 IPC and sentenced him to suffer 1 years' rigorous imprisonment and a fine of Rs. 1,000/=. The petitioner was also convicted for the offence punishable under the Prevention of Corruption Act, 1988 and was sentenced to suffer rigorous imprisonment for two years and a fine of Rs. 2,000/=. Feeling aggrieved, the petitioner has preferred Criminal Appeal No. 449 of 1998 which is pending before this Court. Upon appeal, the petitioner has been released on bail. Pursuant to his conviction, the petitioner has been dismissed from service by the impugned Order dated 13th October, 1998 which is confirmed in revision on 29th November, 1999; as aforesaid.

3. Mr. Supehia has submitted that since the petitioner has preferred appeal against the conviction and the petitioner has been released on bail, the petitioner cannot be dismissed from service. Pending appeal, he ought to be continued under suspension and be paid regular subsistence allowance. He has submitted that even otherwise, the impugned order is vitiated since the petitioner was not afforded an opportunity of hearing before the disciplinary authority nor has the Public Service Commission been consulted before imposing the penalty of dismissal. In support of his contentions, Mr. Supehia has relied upon the judgment of the Hon'ble Supreme Court in the matter of State of Maharashtra v. Chandrabhan [AIR (1983) SC 803] and of this Court in the matter of M.R Shaikh v. State of Gujarat, [1999 (1) GLH (UJ) 8].

4. In response to the notice issued by this Court, the respondents have appeared through the learned Addl. Government Pleader Mr. Hasurkar. Mr. Hasurkar has supported the impugned order and has relied upon the judgments of this Court in the matters of P.D Waghela & Ors. v. G.C Raiger, Deputy I.G.P & Ors., [1994 (1) GLR 240] and of Rambadan R. Shukla & Anr. v. District Superintendent of Police & Anr., [1997 (1) GLR 352]. He

has also relied upon the judgment of the Hon'ble Supreme Court in the matter of Union of India vs. V.K Bhaskar, [1997 (11) SCC 383].

5. The question whether a Government servant who has been convicted of an offence can be dismissed from service pending appeal against conviction was the issue referred to the Full Bench of this Court in the matter of P.D Waghela & Ors. [Supra]. The Court, considering the various provisions of law and rulings of the Hon'ble Supreme Court, held that, 'the conviction spoken to in clause (a) of the second proviso to clause (2) of Article 311, to form a basis for the dismissal, removal or reduction in rank, could be one recorded by a competent Criminal Court in the first instance and the preferring of an appeal or revision against such conviction and the pendency of the same will not alter the position and action taken on the basis of such conviction, need not conform to clause (2) of Article 311, since by the express terms of the second proviso thereto, clause (2) of Article 311 is dispensed with.' The same is the view expressed by the Hon'ble Supreme Court in the matter of V.K Bhaskar [Supra]. In light of this consistent view taken by the Full Bench of this Court and the Hon'ble Supreme Court, the contention raised by Mr. Supehia requires to be rejected. Mr. Supehia has submitted that even otherwise, Rule 156 of the Bombay Civil Service Rules enjoins upon the Government not to proceed against such delinquent servant departmentally whose appeal against conviction is pending before the higher Court, till the result of the appeal. I am afraid, the contention is not tenable. Rule 156 of the Bombay Civil Service Rules essentially deals with suspension of a Government servant against whom proceedings have been taken on a criminal charge. Note thereto emphasises necessity of early disposal of the departmental proceedings against such Government servant and provides that, 'it is, therefore, necessary to ensure that departmental proceedings against the government servant should; save in cases referred to in the succeeding sentence, be concluded as soon as possible, after the case against him is decided in the first Court. In case where a government servant is convicted by the competent Court and sentenced to imprisonment, the departmental proceedings against him should not, however, be completed till the result of an appeal, if any, to a higher Court is known.' The language of the said note suggests the intention of the rule making authority. The said note is merely a guideline to the concerned authorities and cannot be said to be a rule of binding nature. It is merely a directory provision and not a mandatory one;

though the words used are 'should not'. I am, therefore, of the opinion that in view of the law settled in the matter of P.D Waghela & Ors. [Supra] and V.K Bhaskar [Supra], the instruction contained in the said note loses significance and cannot be pressed into service.

6. It is not disputed that the petitioner was not afforded an opportunity of hearing before making the impugned order. The question is whether the petitioner was required to be given such an opportunity. This Court [i.e., myself] in the matter of Rambadan R. Shukla & Anr., [Supra], having considered the judgment of the Hon'ble Supreme Court in the matter of Union of India v. Tulsi Ram Patel [AIR (1985) SC 1416] and Rule 10 (4) of the Gujarat Civil Service [Discipline & Appeal] Rules, 1971 [as amended on 16th April, 1986] has taken the view that the delinquent has no right to an opportunity of making representation or of hearing on the penalty proposed to be imposed. Hence, the order of penalty made without affording an opportunity to the delinquent to show cause against the proposed penalty or of hearing would not be vitiated on that count. The said decision has been confirmed by the Division Bench of this Court [Coram K. Shreedharan, CJ & A.R Dave, J.] on 4th May, 1998 in Letters Patent Appeal No. 5 of 1997. Mr. Supehia has also relied upon the judgment of the learned Single Judge [Coram : Mr. Justice NN Mathur] in the matter of Shankabhai Naginbhai Patel v. State of Gujarat [Special Civil Application No. 2349 of 1998 decided on 23rd July, 1998] [Annexure-G to the petition].

7. In the said judgment, in a similar set of facts, the learned Judge, relying upon the judgment of this Court in the matter of Kiritkumar D. Vyas v. State & Anr., [23 (2) GLR 79] quashed and set-aside the order of removal from service of the delinquent petitioner and directed that, 'it will be open for the respondents to pass a fresh order after giving opportunity of hearing to the petitioner.' As discussed by me in the matter of Rambadan [Supra], since the amendment of 16th April, 1986 in Rule 10 (4) of the Gujarat Civil Service [Discipline & Appeal] Rules, 1971, no hearing is required to be afforded to the delinquent government servant who is punished pursuant to his conviction by a criminal court on a criminal charge. Neither the aforesaid judgment in the matter of Rambadan [Supra] nor the amended rule 10 (4) was brought to the notice of the learned Judge in the matter of Shankabhai [Supra]. The Court had no occasion either to consider the judgment in the matter of Rambadan [Supra] nor the order made in appeal by the Division Bench, nor the amended Rule 10 (4) of the Discipline &

Appeal Rules. The said judgment, therefore, is per incuriam and shall not be applicable.

8. Mr. Supehia has submitted that Article 320 of the Constitution of India enjoins upon the State Government to consult the State Public Service Commission, inter alia, on all disciplinary matters affecting a person serving under the State Government in a civil capacity. The petitioner was appointed as a direct recruit Police Sub Inspector after due selection by the Gujarat Public Service Commission, his service, therefore, could not have been terminated without prior consultation with the Public Service Commission. In answer to the said contention, Mr. Hasurkar has relied upon the proviso to Article 320 (3) of the Constitution. He has submitted that the said proviso empowers the Governor of the State to make the regulations specifying the matters in which either generally or in any particular class of case or in any particular circumstances as respects other services and posts in connection with the affairs of the State it shall not be necessary for the Public Service Commission to be consulted. He has submitted that pursuant to the above referred powers conferred upon the Governor of the State, the Governor has made Regulations known as 'Gujarat Public Service Commission [Exemption from Consultation] Regulations, 1960. Regulation 22 thereof exempts the Government from consulting the Public Service Commission with respect to all services and posts to which appointments are made by authorities subordinate to Government, except the posts mentioned thereunder. Clause (h), inserted vide Government Notification dated 21st January, 1980, refers to 'the posts of Police Sub Inspectors of the Police Department; so far as these posts are not filled in by promotion'. By the Gujarat Public Service Commission [Exemption from Consultation] (Amendment) Regulations, 1997 issued under the Government Notification dated 28th August, 1997, the above referred Clause (h) has been deleted. Hence, though Art. 320 of the Constitution of India enjoins upon the State Government to consult the State Public Service Commission in respect of disciplinary matters affecting a person serving under the Government in a civil capacity, the State Government has been exempted from doing so under the Regulations made by the Governor, under the powers conferred upon him by proviso to Art. 320 (3) of the Constitution as respects the posts and services referred in the said Regulations.

9. Regulation 22 exempts the State Government from consulting the Public Service Commission in respect of

all services and posts to which appointments are made by the authorities subordinate to the Government. Appointment to the posts of Police Sub Inspector is made by the Director General & Inspector General of Police and thus, the consultation in respect of the posts of Police Sub-Inspector has been exempted under Regulation 22. However, by adding Clause (h) by Government Notification dated 21st January, 1980, an exception was made to Regulation 22 in respect of Police Sub-Inspectors of the Police Department who were not appointed by promotion. It is not disputed that the petitioner was appointed to the post of Police Sub Inspector by direct recruitment. Had the Clause (h) been in operation, in case of petitioner also, the consultation with the Public Service Commission would have been required. However, since the amendment of 1997, referred to hereinabove, the said Clause (h) has been deleted. The resultant effect should be that since 28th August, 1997, the State Government is exempted from consultation with Gujarat Public Service Commission in respect of the posts of Police Sub Inspector in the Police Department - whether filled in by promotion or by direct recruitment or in any other manner. Indisputably, the petitioner has been dismissed from service after 28th August, 1997, and in view of the prevalent regulations, no consultation with the Public Service Commission was required in respect of disciplinary action against the petitioner. The order of punishment, therefore, cannot be vitiated for want of consultation with the Public Service Commission. The judgment in the matter of M.R Shaikh [Supra] relied upon by Mr. Supehia cannot be said to be an authority on the matter at issue. In the said matter, the learned Judge was considering punishment imposed upon a delinquent government servant after his retirement under Rule 189 A of the Bombay Civil Service Rules. The said Rule 189 A specifically provides that punishment of withholding or withdrawing pension or any part thereof may be imposed upon a retired government servant provided, inter alia, the Gujarat Public Service Commission shall be consulted before the final orders are passed. The punishment imposed upon the petitioner being not under Rule 189-A, the question of consultation with GPSC under the proviso to the said rule shall not arise. On the facts of the present case, as I have held that in view of the prevalent Gujarat Public Service Commission {Exemption from Consultation} Regulations, 1960, no consultation with the Commission was required, the instruction no. 2.13 issued under the Gujarat Civil Services [Discipline & Appeal] Rules, 1971 relied upon by Mr. Supehia shall have no applicability.

10. The contention that the disciplinary authority is required to await the decision on the appeal against conviction and that till such appeal is decided, the delinquent should be kept under suspension and be paid subsistence allowance is also misconceived and requires to be rejected.

11. Reliance placed on Re : Chandrabhan, in this regards, is wholly misconceived. In the said matter, the Hon'ble Court was considering the validity of Rule 151 (i), (ii) (b) and the second proviso thereto. The rule under consideration provided for payment of subsistence allowance at the rate of Re. 1 per month to a government servant who is convicted by the competent Court and sentenced to imprisonment and whose appeal against conviction and sentence is pending. The Court held that, '...if the civil servant under suspension, pending a departmental inquiry or a criminal trial started against him, is entitled to subsistence allowance at the normal rate which is a bare minimum required for the maintenance of the civil servant and his family, he should undoubtedly get it even pending his appeal filed against his conviction by the trial Court, and his right to get the normal subsistence allowance pending consideration of his appeal against his conviction should not depend upon the chance of his being released on bail and not being lodged in prison on conviction by the trial Court. Whether he is lodged in a prison or released on bail on his conviction pending consideration of his appeal, his family requires the bare minimum by way of subsistence allowance. Subsistence allowance provided for in the second proviso at the nominal rate of Re. 1 per month is illusory and meaningless.' The Court further held that, '...payment of subsistence allowance at the normal rate pending the appeal filed against the conviction or a civil servant under suspension is a step that makes the right of appeal fruitful, and it is therefore, obligatory. Reduction of the normal subsistence allowance to the nominal sum of Re. 1 per month on conviction of a civil servant under suspension in a criminal case pending his appeal filed against the conviction, whether the civil servant is on bail or has been lodged in prison on conviction pending consideration of his appeal, is an action which stultifies the right of appeal and is consequentially unfair and unconstitutional. Just as it would be impossible for a civil servant under suspension who has no other means of subsistence to defend himself effectively in the trial Court without the normal subsistence allowance. Thus, the Court was alive to the fact that while under suspension, the delinquent government servant is not

supposed to undertake any other employment and he should be required to be paid atleast the normal subsistence allowance for his maintenance. However, the said judgment cannot be read to mean that it is obligatory upon the Government to continue the delinquent government servant who has been convicted on a criminal charge, in service inspite of the conviction and to continue to pay him normal subsistence allowance till his appeal against the order of conviction and sentence is disposed of. It only enjoins upon the State Government to continue to pay the normal subsistence allowance instead of a nominal subsistence allowance of Re. 1 per month to a delinquent government servant who has been continued in service inspite of his conviction and is kept under suspension.

12. No other contention is raised before me. In view of the conviction of the petitioner and the sentence imposed upon him, the impugned order dismissing the petitioner from service is wholly justified. Petition is dismissed. Notice is discharged.

Prakash*